Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

CITY OF EAST PALO ALTO, GREGORY EATMON, BURNHAM MATTHEWS, ALLEN PARKER, PHILLIP JOHNSON, MATTHEW SPRAY, THOMAS ALIPIO, DOUGLAS MEDINA and TRACY FREY,
Petitioners,
v.
ANTHONY WILLIAM HAZZARD, SR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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52 pp

QUESTION PRESENTED

Whether, in the context of a claim under 42 U.S.C. § 1983, a name-clearing hearing is required by the Fourteenth Amendment after the termination of an at-will public employee when there is no public disclosure of the reasons for the termination.

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PETITION FOR A WRIT OF CERTIORARI

The City of East Palo Alto, Gregory Eatmon, Burnham Matthews, Allen Parker, Phillip Johnson, Matthew Spray, Thomas Alipio, Douglas Medina and Tracy Frey respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The unreported opinion of the court of appeals is attached as Appendix A, 1a-10a. The court of appeals' order denying

defendants' petition for rehearing is attached as Appendix B, 11a. The unreported opinion and judgment of the district court is attached as Appendix C, 12a-35a.

JURISDICTION

The court of appeals entered its judgment on January 8, 1996 and denied defendants' petition for rehearing on February 20, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of

this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Hazzard sued the City of East Palo Alto, Police Chief Burnham Matthews and other City employees under 42 U.S.C. § 1983 in the United States District Court for the Northern District of California. He contended, *inter alia*, that Chief Matthews had deprived him of liberty without due process of law under the Fourteenth Amendment when he terminated his employment but did not give him a hearing to clear his name.

Chief Matthews had terminated Hazzard's employment in a letter dated April 23, 1992. The letter merely stated that his services would no longer be required and did not give any reasons for the discharge. A true and correct copy of the letter is attached as Appendix D, 36a.

Earlier, on April 16, 1992, a search warrant had been served on Hazzard's residence in connection with an inventory and audit of the Police Department's property. Chief Matthews thereafter issued a press release regarding the matter and an article was published in the Peninsula Times Tribune on April 19, 1992. A true and correct copy of the Press Release is attached as Appendix E, 37a-38a.

The article stated that Hazzard had been placed on paid administrative leave after an investigation by an outside auditor had revealed that there were discrepancies in the records and that money was missing. The article said that Hazzard had been questioned and released but that Chief Matthews had declined to indicate whether he would be arrested or fired. A true and correct copy of the article is attached as Appendix F, 39a-41a.

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and granted summary judgment for defendants. Hazzard appealed. The court of appeals reversed citing *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398 (1980).

REASONS FOR GRANTING THE PETITION

The petition should be granted because the court of appeals' decision conflicts with *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972), *Bishop v. Wood*, 426 U.S. 341, 96 S. Ct. 2074 (1976) and *Owen, supra*.

In *Roth*, the Court held that due process under the Fourteenth Amendment did not require that a nontenured teacher be given a hearing prior to a decision not to renew his contract. The Court reasoned as follows:

> The State, in declining to hire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty or immorality.

Id. at 573.

There is no deprivation of a liberty interest and no obligation to provide a name-clearing hearing to an employee "whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge." *Bishop, supra*, 426 U.S. at 348.

In this case, Hazzard was employed at will and the written notice of his discharge did not state any reasons for his termination. The article did not state that he had been accused of a crime or that his employment had been terminated. In fact, according to the article, Chief Matthews

had declined to comment on whether Hazzard would be arrested or fired.

Because the article did not say that Hazzard had or would be fired, there was no linkage in the public between any impressions conveyed about him in the article and his termination four days later. The existence of such linkage was what prompted the Court in *Owen* to conclude that the police officer in that case had been deprived of liberty without due process of law.

In *Owen*, a city councilman had read a statement at a regularly scheduled council meeting regarding an investigation of the police department's property. Among other things, he charged that the police chief had misappropriated some of the department's property for his own use. The council thereafter released 27 volumes of reports regarding the investigation to the media.

In *Owen*, unlike in this case, "[t]he local press gave prominent coverage both to the City Council's action and petitioner's dismissal, linking the discharge to the investigation." *Owen, supra*, 445 U.S. at 629. The Court detailed the press coverage as follows:

> The investigation and its culmination in petitioner's firing received front-page attention in the local press. See, e.g., "Lid Off Probe, Council Seeks Action," Independence Examiner, Apr. 18, 1972, Tr. 24-25; "Independence Accusation. Police Probe Demanded," Kansas City Times, Apr. 18, 1972, Tr. 25; "Probe Culminates in Chief's Dismissal," Independence Examiner, Apr. 19, 1972; "Police Probe Continues; Chief Ousted," Community Observer, Apr. 20, 1972, Tr. 26.

Id.

The council meeting in *Owen* had occurred on April 17, 1972 and the police chief had been fired on April 18. The newspaper articles which linked the investigation to the

chief's dismissal were thereafter published on April 19 and April 20. Thus, in *Owen*, the police chief had been fired because of the investigation and the reasons for his discharge had been disclosed to the public.

In this case, however, the article in question was published before Hazzard's termination and did not state that he would be fired as a result of the investigation. Hazzard therefore was not deprived of his liberty under the Fourteenth Amendment and was not entitled to a name-clearing hearing because the crucial linkage in the public between the investigation and his discharge was not present.

CONCLUSION

The court of appeals' decision conflicts with rulings by this Court on important questions of constitutional law and procedure. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

No. 94-16230

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY WILLIAM HAZZARD, SR.
Plaintiff - Appellant

v.

CITY OF EAST PALO ALTO,
a municipal corporation, et al.
Defendants — Appellees.

D.C. No. CV-92-04566-WHO

Filed January 8, 1996
Cathy A. Catterson, Clerk
U.S. Court of Appeals

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, Jr., District Judge, Presiding
Argued and Submitted November 15, 1995
San Francisco, California

Before: NORRIS, BEEZER, and TROTT, Circuit Judges

Plaintiff Anthony William Hazzard filed this action against the City of East Palo Alto, Lieutenant Gregory Eatmon, Police Chief Burnham Matthews, City Manager Allen Parker, Officers Phillip Johnson, Matthew Spray, Thomas Alipio, Douglas Medina, and Reserve Officer Tracy

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Frey for violations of 42 U.S.C. §§ 1981, 1983, and 1985. The district court granted summary judgment for the defendants on all of Hazzard's claims.

I

DEPRIVATION OF LIBERTY INTEREST WITHOUT DUE PROCESS

Hazzard alleges that he was deprived of a liberty interest without due process of law when Police Chief Matthews made public allegations of theft during the course of terminating Hazzard, but denied him a hearing to clear his name. The district court held that Hazzard had failed to demonstrate a protected interest because he "failed to point to any California law that creates a *property interest* in being free from libel." Mem. Dec. and Order of Dist. Ct. at 20.

However, Hazzard has demonstrated a protected *liberty interest* sufficient to require the protection of due process. *Owen v. City of Independence*, 445 U.S. 622 (1980) is squarely on point. In *Owen*, the Supreme Court stated that a police officer was deprived of a liberty interest when he was publicly and falsely accused of theft during the course of termination. *Id.* at 633 n.13.

Defendants' contention that Hazzard was not publicly stigmatized because he was never publicly charged with a crime is without merit. Police Chief Matthews issued a press release only days before Hazzard's termination that clearly implied that Hazzard was suspected of theft. Matthews also made statements to a reporter that made clear that Hazzard was under investigation because he was suspected of theft. Because Hazzard has presented sufficient probative evidence in opposition to the summary judgment on this claim, it must be reversed.

II

UNREASONABLE DETENTION OF HAZZARD

Hazzard alleges that the officers violated the Fourth Amendment when they arrested him in the car before the search and transported him to his home for questioning. In response, the defendants merely contend that Hazzard was free to leave his house, and alternatively that any detention was justifiable under the Fourth Amendment. The district court granted summary judgment for the defendants, holding that the seizure was reasonable as a detention incident to the execution of a search warrant. *See Michigan v. Summers*, 452 U.S. 692 (1981).

The district court erred because it failed to consider the evidence that Hazzard was detained not at or near his home, but rather at some distance from his home and was then transported to his home. *Michigan v. Summers* applies only to situations in which an individual is asked to remain at his home while police officers conduct a search. *Id.* at 705. It does not permit officers to detain an individual at an entirely different location and transport him to the scene of the search.

Hazzard has presented evidence that the detention commenced in the car at a location nowhere near his home, and that he was subsequently transported to his home.[1] He stated in his affidavit:

> I was told that I would be going to Oakland to serve a search warrant. While en route, I was disarmed by defendant Lt. Eatmon and San Mateo District Attorney Inspectors Bruce Sabin and George Thorpe. I was interrogated in the car as all three persons attempted to get me to confess to something I did not do.

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[1] Although Hazzard raised this issue to the district court, the district court failed to address it.

Decl. Anthony Hazzard in Opp'n Mot. Summ. J. at 9. The defendants, in contrast, presented no evidence tending to show either that Hazzard was not detained at that moment, or that if he was, the detention was reasonable.[2] Because a jury could find from Hazzard's evidence that a reasonable person would have believed that he was not free to leave, *see United States v. Mendenhall*, 446 U.S. 544, 554 (1980), we hold that Hazzard has raised a triable issue of fact as to whether he was unreasonably seized from the moment he was disarmed and interrogated in the car. The district court's grant of summary judgment on this claim is reversed.

III

QUALIFIED IMMUNITY AS TO SEIZURES OF PROPERTY

Hazzard alleges that Lt. Eatmon and Officers Alipio, Spray, Medina, Frey, and Johnson violated the Fourth Amendment when they seized property in excess of the scope of the search warrant. The district court granted qualified immunity to the defendants on the ground that it was reasonable to seize the property because the seized items were in plain view.

We review *de novo* the application of qualified immunity. *Hervey v. Estes*, 65 F.3d 784, 788 (9th Cir. 1995). Because the parties do not dispute that Hazzard's rights were clearly established at the time of the alleged misconduct, the defendants bear the burden of proof to show that a reasonable officer could have believed lawful the particular conduct at issue. *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991).

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[2]The evidence presented by the defendants relates only to the seizure *during* the search, not *prior* to it.

First, the defendants seized two firearms in addition to the firearm issued to Hazzard by the Department. The district court held that "it was reasonable for the police officers to seize . . . the firearms (because firearms were missing from the property section) . . . ." Mem. Dec. and Order of Dist. Ct. at 16. The basis for this conclusion was Eatmon's testimony that "it was believed that the guns belonged to the department . . . . I knew that a substantial number of firearms were missing from the department . . . ." Decl. Gregory Eatmon in Supp. Mot. Summ. J. at 3. We disagree that a reasonable officer could have believed that this evidence constituted probable cause to seize the firearms. The defendants present no evidence connecting the seized firearms with the unspecified firearms that were missing from the department. The defendants do not, for example, offer evidence that they recognized the serial numbers on the seized guns, or even that the police department was known to own guns of the same type as the seized guns. Because a reasonable officer could not have believed that there was probable cause to seize the two firearms, the defendants are not entitled to qualified immunity as to the firearms.

Second, the defendants seized approximately 200 computer disks. The district court concluded that it was reasonable to seize the disks because "many of the discs had labels that showed their contents concerned the East Palo Alto Police Department . . . ." Mem. Dec. and Order of Dist. Ct. at 16. However, the only evidence supporting the seizure of the computer disks was the testimony of Officer Alipio that a "couple of them" were marked " 'East Palo Alto Police Gun Inventory' and things like that . . ." Decl. Darryl Parker in Opp'n Mot. Summ. J., Ex. B, at 190. This evidence demonstrates no basis whatsoever for a belief that there was probable cause to seize the vast majority of the disks, which had no apparent connection to the department. Therefore, the defendants are not entitled to qualified immunity as to

the disks that did not have labels connecting them to the department.

Finally, we agree with the district court that the defendants are entitled to qualified immunity as to the remaining seized items. Regarding the leather gear, the district court granted qualified immunity on the basis that "this is the type of gear that the East Palo Alto Police Department issues to its police officers." Mem. Dec. and Order of Dist. Ct. at 16. Regarding the computer and accessories, the district court explained that "Lt. Eatmon recognized the computer as one which had been in the department's property section . . . ." *Id.* Although Hazzard explained to Eatmon at the time of the search that the computer had been purchased from the Department, a reasonable officer could have disbelieved this explanation. Regarding the personal papers, the officers acted pursuant to the authorization in the search warrant to seize "personal property tending to establish the identity of persons in control of premises and vehicles." Decl. Gregory Eatmon in Supp. Mot. Summ. J., Ex. B. For these reasons, we affirm the grant of qualified immunity as to the leather gear, the computer and accessories, and the personal papers.

In sum, we reverse the district court's grant of qualified immunity as to the two firearms and the disks unrelated to the police department. We affirm the grant of qualified immunity as to the leather gear, the computer and accessories, and the personal papers.

IV

HAZZARD'S OTHER CLAIMS

A. The District Court's Scheduling of the Summary Judgment Motion

Hazzard contends that the district court abused its discretion by permitting the defendants to file a motion for

summary judgment "on virtually the eve of trial." Appellant's opening Br. at 12. This argument is without merit. Hazzard had ample time in which to respond to the motion for summary judgment because the district court continued the trial from April 4 to July 11, and gave the parties the opportunity to file supplemental papers (which Hazzard did on June 14) Therefore, there was no abuse of discretion.

B. Qualified Immunity as to Allegedly Invalid Search Warrant

Hazzard argues that the search was invalid under the Fourth Amendment because the search warrant was procured with false and misleading statements. To survive summary judgment, Hazzard must both make a substantial showing of a deliberate falsehood, and establish that the remaining information in the affidavit is insufficient to establish probable cause. *See Hervey v. Estes*, 65 F.3d 784, 789 (9th Cir. 1995). The district court granted qualified immunity because it determined that the affidavit established probable cause even viewed without the allegedly false statement. We agree. The other evidence contained in the affidavit, in particular Hazzard's failure to disclose property storage sites during the audit and his averment that he did not possess a key to one of the sites when he did in fact possess such a key, is sufficient to establish probable cause. Therefore, we affirm the grant of qualified immunity.

C. Qualified Immunity as to the Search of the MG

Hazzard claims that the search of his other car, an MG, violated the Fourth Amendment because that car was not listed in the warrant. However, a reasonable officer could have believed that Hazzard consented to that search based on statements that Hazzard made to the officers during the execution of the search warrant. Therefore, the officers are entitled to qualified immunity.

D. Confiscation of Property Without Due Process

Hazzard claims that the confiscation and retention of his property seized during the search constituted a deprivation of property without due process of law. However, intentional deprivations of property do not violate the Due Process Clause if adequate state post-deprivation remedies are available. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984). Because Hazzard could have filed a motion for return of his property before the state court judge who issued the warrant, an adequate post-deprivation remedy was available. Therefore, there was no violation of procedural due process.[3]

E. Termination without Due Process

Hazzard contends that the City deprived him of a protected property interest when it terminated his employment with the Police Department. However, Hazzard had no constitutionally protected property interest in continued employment because his contract with the Police Department had expired. In the absence of a contract, California law presumes that employment is at will. *See Schneider v. TRW, Inc.*, 938 F.2d 986, 990 (9th Cir. 1991); Cal. Lab. Code § 2922 (West 1989). This presumption may be overcome with evidence of contrary intent. *Schneider*, 938 F.2d at 990. However, Hazzard has failed to offer any such evidence. We agree with the district court that the statement made by Acting Chief Ronald Sibley, assuring Hazzard that his contract would be renewed, constitutes only an indefinite promise to renew the contract in the future.[4] Therefore, Hazzard has failed to show that he was deprived of a

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[3]Moreover, Hazzard has failed to offer any authority for the proposition that an intentional deprivation of property can constitute a denial of substantive due process.

[4]In any event, Hazzard does not dispute the district court's determination that this statement was inadmissible hearsay, which cannot be considered in a motion for summary judgment.

protected property interest, and the district court did not err in granting summary judgment for the defendants on this claim.

F. Racial Discrimination

Finally, Hazzard alleges that the City is liable for racial discrimination because Chief Burnham and City Manager Parker terminated him because of his race. Municipalities may be held liable under § 1983 only for actions pursuant to official policy or custom. *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 690-91 (1978). Hazzard seems to argue that the actions of Burnham and Parker constituted an act of official governmental policy because they had "final policy-making authority." *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986); *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992). However, the determination of who constitutes a final policy-maker for purposes of § 1983 is a question of state law. *See Jackson v. Gates*, 975 F.2d 648, 654 (9th Cir. 1992). Because Hazzard points to no evidence establishing that either Burnham or Parker had final policy-making authority over terminations, he has failed to raise a triable issue of fact as to this claim. We therefore affirm the district court's grant of summary judgment.

V

CONCLUSION

The district court's grant of summary judgment is REVERSED as to Hazzard's due process claim arising from Chief Matthews's public allegations of theft.

The district court's grant of summary judgment on Hazzard's claim of unreasonable detention is also REVERSED.

The district court's grant of qualified immunity as to the seizure of the firearms and the computer disks not connected to the Police Department is also REVERSED.

Finally, the district court's judgment is AFFIRMED as to all of the remaining claims.

HAZZARD v. CITY OF EAST PALO ALTO, No. 94-16230

TROTT, Circuit Judge, Concurring and Dissenting.

I concur in Parts I and IV of the panel's disposition, but for the reasons given by the district court in its Memorandum Decision and Order dated June 28, 1994, I would affirm on all issues raised in Parts II and III.

APPENDIX B

NOT FOR PUBLICATION

No. 94-16230

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY WILLIAM HAZZARD, SR.
Plaintiff — Appellant

v.

CITY OF EAST PALO ALTO,
a municipal corporation, et al.,
Defendant — Appellee.

Filed February 20, 1996
Cathy A. Catterson, Clerk, U.S. Court of Appeals

D.C. No. CV-92-04566-WHO

ORDER

Before: NORRIS, BEEZER, and TROTT, Circuit Judges

The memorandum disposition filed January 8, 1996 is hereby amended as follows:

Insert the following footnote at page 3, line 2, following the word "reversed":

> The defendants argue in passing that Police Chief Matthews is entitled to qualified immunity as to this claim because he sought the advice of an attorney before terminating Hazzard. We leave this question of qualified immunity open on remand.

With this amendment, the petition for rehearing is DENIED.

APPENDIX C

Original Filed June 28, 1994
Richard W. Wieking,
Clerk, U.S. District Court
Northern District of California

No. C 92-4566 WHO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ANTHONY WILLIAM HAZZARD, SR.
Plaintiff,

vs.

CITY OF EAST PALO ALTO, et al.,
Defendants.

On November 23, 1992, plaintiff Anthony William Hazzard, Sr. ("Hazzard") filed this action against the City of East Palo Alto ("East Palo Alto"), Lieutenant Gregory Eatmon ("Lt. Eatmon"), Police Chief Burnham Matthews ("Chief Matthews"), City Manager Allen Parker ("City Manager Parker"), Officers Phillip Johnson, Matthew Spray, Thomas Alipio, Douglas Medina, and Reserve Officer Tracy Frey (collectively referred to as "the defendant officers"), for violation of 42 U.S.C. §§ 1981, 1983, and 1985. Defendants have filed a motion for summary judgment as to all of Hazzard's claims. For the reasons hereinafter stated, defendants' motion for summary judgment is GRANTED in its entirety, and the case is dismissed.

I.

Hazzard was hired as an East Palo Alto police officer on August 10, 1989. After failing to complete the Field Officer's Training Program, he resigned his position and became a Non-Designated Reserve Officer on August 25,

1989. In June 1990, Hazzard was hired to work for twelve months as the property officer for the police department, under a written contract. Hazzard's written contract expired in June 1991, and was not renewed in writing (Hazzard contends his employment contract was orally renewed). Hazzard continued to work as a property officer until his employment was terminated on April 23, 1992.

In February, 1992, Chief Matthews hired James L. Westbrook, Ph.D. ("Westbrook") to conduct an audit of the police department's property section. In March 1992, Westbrook reported that over $4000 was missing from the property section and recommended that Hazzard, the property officer, be placed on administrative leave while the investigation into the losses continued.

In April 1992, in connection with the above described investigation, Lt. Eatmon, one of the defendants, prepared an affidavit in support of a request for a search warrant for Hazzard's residence and car in Richmond, California. The affidavit was prepared solely by Lt. Eatmon, and was reviewed by Deputy District Attorney Wagstaff ("Wagstaff"). Wagstaff and Lt. Eatmon presented the affidavit to Judge John W. Runde of the San Mateo County Municipal Court, and Judge Runde issued the search warrant on April 10, 1992.

On April 14, 1992, Lt. Eatmon advised Officers Alipio (defendant), Spray (defendant), Medina (defendant), Frey (defendant), Johnson (defendant) and Chalmers (not a defendant) that they would be executing a search, pursuant to the warrant, on Hazzard's residence. Officers Alipio, Frey, and Johnson conducted the actual search. While the search was being conducted, Hazzard was interviewed/questioned by Lt. Eatmon and Inspectors Thorpe and Sabin. During the questioning, Lt. Eatmon employed two "ruses": (1) he falsely told Hazzard that another police officer had confessed to stealing property and money from

the Property Section, and had implicated Hazzard in the crime; and (2) he falsely told Hazzard that two Property Section envelopes had been discovered in his room, and showed Hazzard two envelopes that he had an officer "find" for that purpose.

On April 16, 1992, Chief Matthews issued a press release describing the search of Hazzard's home in connection with the investigation of missing property. One newspaper ran a story as a result of the press release. The published newspaper article was entitled "Officer put on leave: Money allegedly stolen from storage locker." On April 23, 1992, Chief Matthews fired Hazzard.

On December 13, 1993, Hazzard filed a second amended complaint against East Palo Alto, Lt. Eatmon, Chief Matthews, and City Manager Parker, in their individual and official capacities, and Officers Johnson, Spray, Alipio, Medina, and Frey. Hazzard has alleged seven causes of action:

1. "Racial Discrimination — Municipal Liability" (Sections 1981 and 1983). Hazzard alleges he was terminated from his position by East Palo Alto, acting through Chief Matthews and City Manager Parker, because of his race.

2. "Illegal, Search, Seizure and Detention" — Violation of Section 1983. Hazzard alleges that his rights were violated by the actions of Lt. Eatmon and the defendant officers in conducting a search of his residence and detaining him.

3. "Illegal Confiscation of Property" — Violation of Section 1983. Hazzard alleges that Eatmon and the defendant officers, in conducting the search warrant, confiscated his property without due process.

4. "Deprivation of Civil Rights While in Employment" — Violation of Section 1983. Hazzard alleges that Chief Matthews violated his First Amendment rights by terminating him in retaliation for his grand jury testimony in

1990, and violated his due process property interest in his job by firing him. Hazzard also alleges that Chief Matthews disseminated untrue information about him to the newspapers in the April 16, 1992, press release, violating his right to privacy. Hazzard alleges that Chief Matthews and City Manager Parker deprived him of his right to a *Skelly* administrative hearing to clear his name. *See Skelly v. State Personnel Bd.*, 15 Cal. 3d 194, 539 P.2d 774, 124 Cal. Rptr. 14 (1975).

5. "Deprivation of Civil Rights While in Employment (Municipal Liability)". Hazzard alleges that East Palo Alto deprived him of the rights described in the Fourth Cause of Action, through the above-described conduct of Chief Matthews and City Manager Parker.

6. "Deprivation of Civil Rights Self Incrimination" — Section 1983. Hazzard alleges that Lt. Eatmon is liable under section 1983 for violating his Fifth Amendment rights against self incrimination and his right to remain silent.

7. "Conspiracy to Deprive Plaintiff of his Civil Rights" — 42 U.S.C. [§] 1985. Plaintiff alleges that the actions of the defendant officers and Lt. Eatmon in searching his residence, confiscating property, and interrogating him without giving him *Miranda* warnings constituted a conspiracy to violate his civil rights.

II.

A.

Rule 56 of the Federal Rules of Civil Procedure provides that a court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Supreme Court's 1986 "trilogy" of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), requires that a party seeking summary judgment identify evidence that shows the absence of a genuine issue of material fact. Once the moving party has made this showing, the non-moving party must "designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(c)). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50 (citations omitted).

B.

Defendants have moved for summary judgment on all of Hazzard's claims, on the following grounds: (1) Hazzard's first cause of action, for racial discrimination, on the ground that East Palo Alto did not have a custom, policy, or practice of racial discrimination; (2) Hazzard's second and third causes of action, for § 1983 violation of his Fourth Amendment rights, on the grounds the search was conducted pursuant to a valid warrant and for probable cause, was reasonable in scope, and detention was justified; (3) Hazzard's fourth and fifth causes of action, for deprivation of civil rights in employment under § 1983, on the grounds that Hazzard was not terminated for testifying in front of the grand jury, the press release did not violate § 1983, and Hazzard was not entitled to a *Skelly* administrative hearing; (4) Hazzard's sixth cause of action, for violation of his Fifth Amendment rights against self incrimi-

nation, on the grounds that there is no § 1983 liability for failure to give *Miranda* warnings, there was no Fourth Amendment seizure, and any detention was justified; and (5) Hazzard's seventh cause of action, for conspiracy, on the ground that no underlying civil rights violations occurred.

Defendants also argue that Lt. Eatmon and the defendant officers are entitled to qualified immunity in connection with all incidents involving the search of Hazzard's residence, and that Chief Matthews is entitled to qualified immunity for his decision to fire Hazzard without an administrative hearing, because he did so based on the advice of an attorney.

The Court will discuss each of Hazzard's causes of action in turn.

1. First Cause of Action: § 1983 Claim for Municipal Liability for Racial Discrimination.

In his first cause of action, Hazzard alleges that Chief Burnham and City Manager Parker terminated him from his position as reserve officer "because of his race, Black, in violation of 42 U.S.C. § 1981 and 1983." (Compl. ¶ 31.) Defendant East Palo Alto argues for summary judgment in its favor on Hazzard's § 1983 action for racial discrimination[1] on the ground that the harm (if any) that Hazzard suffered did not result from East Palo Alto's "official policy."

Municipalities are "persons" for purposes of § 1983, and may be sued for constitutional torts caused by their official

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[1] Hazzard's § 1981 claim is subsumed within his § 1983 claim. In *Jett v. Dallas Independent School District*, the Supreme Court held that a municipality may not be held liable for its employees' violation of § 1981 under a *respondeat superior* theory. The Court further held that § 1983 provides the exclusive federal damages remedy for the violation of rights guaranteed by § 1981 when the alleged violation is by a state actor.

policies or customs. *Monell v. Department of Social Servs.*, 436 U.S. 658, 690-91 (1978) (overruling in part *Monroe v. Pape*, 365 U.S. 167, (1961). In cases involving municipalities, the "official policy" requirement is the linchpin of § 1983 analysis because liability does *not* attach to a city or county under a theory of *respondeat superior. Id.* at 691.

A § 1983 plaintiff may satisfy the "official policy" requirement by showing any one of the following: (i) that the challenged action resulted from "a policy statement, ordinance, regulation, or decision officially adopted or promulgated by [the municipality's] officers[;]" *Id.* at 690; (ii) that the action in question was illustrative of a "custom" or "practice" that is "so permanent and well settled as to constitute a 'custom or usage' with the force of law[;]" *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970); or (iii) that the purportedly unconstitutional act was the direct result of inadequate training or supervision. *City of Canton v. Harris*, 489 U.S. 378, 387 (1989).

Hazzard bases his action on the first theory of "official policy." Hazzard argues that Chief Matthews had final decisionmaking power sufficient to create municipal liability under § 1983. It is Hazzard's position that Chief Matthews terminated him because of his race. For the reasons discussed below, Hazzard has failed to create a triable issue with respect to the first theory, that he was harmed as a result of final action by an official policymaker.

The Supreme Court has clarified the circumstances under which "a decision on a single occasion may be enough to establish an unconstitutional policy." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion of O'Connor, J.). "[O]nly those municipal officers who have 'final policymaking authority' may by their actions subject the government to § 1983 liability." *Id.* (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion of Brennan, J.)). "[W]hether a particular official has 'final

policymaking authority' is a question of *state law*." *Id.* (quoting *Pembaur*, 475 U.S. at 483). The *Praprotnik* plurality had a good deal to say on the matter of what "final" means for purposes of defining "final policymaking authority":

> When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies.

Id. at 127.

Assuming, for the sake of argument, that Chief Matthews *had* terminated Hazzard on account of his race, Chief Matthews would have been *departing* from the official policy of East Palo Alto, which prohibits racial discrimination. Section 3.1.08 of East Palo Alto's Personnel Policies and Procedures provides:

NON-DISCRIMINATION

> There shall be no discrimination by the City, recognized employee organizations, or anyone employed by the City for or against any employee or applicant for employment, promotion, demotion or discharge, because of *race* . . . .

(Personnel Policies and Procedures § 3.1.08, attached as Ex. I to Decl. of Russell Averhart, filed March 1, 1994.) Under the holding of the *Praprotnik* plurality, East Palo Alto's non-discrimination policy, not Chief Matthews' alleged departure from it, is the act of the municipality.

Accordingly, § 1983 liability for East Palo Alto cannot be premised on the existence of an "official policy" to discrimi-

nate on the basis of race. Defendants' motion for summary judgment on Hazzard's First Cause of Action must be granted.

2. Second Cause of Action: § 1983 Claim for Violation of Fourth Amendment Rights.

In his second cause of action, Hazzard alleges that Lt. Eatmon and Officers Alipio, Spray, Medina, Frey, and Johnson are liable under § 1983 for "detaining and searching plaintiff and his residence." (Second Amended Complaint ¶ 34.) Hazzard's allegations in the Second Cause of Action fall into three categories: (1) the search as a whole was invalid under the Fourth Amendment because the search warrant was procured with false and misleading statements; (2) the search was unreasonable because the police officers went beyond the scope of the search warrant in confiscating a number of Hazzard's possessions; (3) Hazzard was unlawfully detained against his will.

Defendants argue that the search warrant was valid, the search and detention of Hazzard were reasonable and within constitutional boundaries, and that, in any event, all the officers are entitled to qualified immunity.

a. Validity of the Search Warrant.

The search of Hazzard's home on April 14, 1992, was conducted pursuant to a search warrant issued on April 10, 1992, by Judge Runde of the San Mateo County Municipal Court. (Search warrant attached as Ex. B to Decl. of Gregory Eatmon, filed March 1, 1994.) Judge Runde issued the search warrant on the basis of an affidavit submitted by Lt. Eatmon. (Affidavit attached as Ex. A. to Eatmon Decl.)

First, in regard to Officers Alipio, Spray, Medina, Frey, and Johnson, the Ninth Circuit has held that "for purposes of section 1983 immunity, an officer is entitled to assume the validity of a search warrant secured by fellow officers."

Morris v. County of Tehama, 795 F.2d 791, 795 (9th Cir. 1986). Of course, there are exceptions to this broad rule; the Supreme Court has held that an officer would not "manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " *United States v. Leon*, 468 U.S. 897 (1984) (quoting *Brown v. Illinois*, 422 U.S. 590, 610-11 (Powell, J., concurring in part) (1975)). In this case, the affidavit clearly provides the requisite indicia of probable cause, so Officers Alipio, Spray, Medina, Frey, and Johnson are entitled to qualified immunity from § 1983 liability for Fourth Amendment violations stemming from Hazzard's claim that they searched his house pursuant to an invalid warrant.

Hazzard's allegations, however, are focused on Lt. Eatmon, who supplied the affidavit for the search warrant. In *Malley v. Briggs*, 475 U.S. 335, 345 (1986), the Supreme Court held that a police officer is entitled to qualified immunity from a suit for damages arising from an allegedly illegal arrest or search unless "a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." In *Forster v. County of Santa Barbara*, 896 F.2d 1146 (9th Cir. 1990), the Ninth Circuit held that, in applying this test, the Court "must first decide whether the warrant was valid; if not, [the court] must then determine whether the police officer's reliance on the warrant was nonetheless objectively reasonable." 896 F.2d at 1148.

"A warrant is valid only if supported by an affidavit establishing probable cause." *Id.* (citing *United States v. Stanert*, 762 F.2d 775, 778 (9th Cir.), *amended*, 769 F.2d 1410 (9th Cir. 1985). The Ninth Circuit has stated that "[t]here is 'a presumption of validity' with respect to the affidavit supporting a warrant." *Forster*, 896 F.2d at 1148

(quoting *Franks v. Delaware*, 438 U.S. 154 (1978)). This presumption can be overcome, however:

> if the party challenging the falsehood makes allegations of deliberate falsehood or reckless disregard for the truth, and those allegations are accompanied by an offer of proof. If these requirements are met, the allegedly false or reckless material must be set aside. If there remains sufficient content in the affidavit to support probable cause, the officer is qualifiedly immune.

Forster, 896 F.2d at 1148 (internal citations omitted).

Hazzard alleges that Lt. Eatmon's affidavit contained a deliberate falsehood:

> Lt. Eatmon stated in his affidavit that plaintiff was the only person with access to the drop safe between March of 1991 and February of 1992. Defendant knew this to be an outright lie when he wrote the affidavit.

(Compl. ¶ 19.) Hazzard refers to the portion of Lt. Eatmon's affidavit that states:

> Dr. Westbrook, as part of his examination of our agency's property section, compared our agency's reports, documenting the monies seized and booked into its property section by officers from 27th February 1991 to 27th March 1992 with what was actually stored in our agency's drop safe. Dr. Westbrook discovered monies totaling $4,381.26 were missing from 21 different cases involving 16 different officers from this agency. This discovery was significant, because *Mr. Hazzard was the only person to have accessed our agency's drop safe alone, during that period.*

(Affidavit attached as Ex. A. to Eatmon Decl., at 18 (emphasis added).)

First, it is apparent that Hazzard has mischaracterized Lt. Eatmon's statement in the affidavit. Lt. Eatmon stated that Hazzard was the only person to have had access to the drop safe *alone* during the relevant period, *not* that he was the only person to have had access to the drop safe. Second, even assuming that Hazzard has met his burden of making an offer of proof as to the falsehood of Lt. Eatmon's statement, there remains sufficient content in the affidavit to support probable cause even if Lt. Eatmon's alleged falsehood is excluded,[2] and, therefore, Lt. Eatmon is entitled to qualified immunity. *Forster*, 896 F.2d at 1148.

b. Reasonableness of the Search.

Hazzard alleges that the search was unreasonable, and therefore violated the Fourth Amendment, because the police officers exceeded the scope of the search warrant by seizing a number of items not listed in the search warrant. Specifically, Hazzard contends the following items were

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[2]Other facts supporting the issuance of the search warrant are as follows: (1) Westbrook's identification of a shortfall of $4,381.26; (2) Hazzard's position as the East Palo Alto Police Department's sole property officer since January 16, 1990; (3) Hazzard's failure to disclose property storage sites to Westbrook during the audit; (4) Hazzard's averment to Westbrook that he did not possess a key to one of the storage cites, when he did, in fact, possess such a key; (5) Hazzard's statement that he had taken evidence envelopes home to his residence; (6) Hazzard's failure to disclose a storage cabinet containing money, jewelry, and narcotics; and (7) Hazzard's payment of approximately $8,000 to an individual over a ten month period with no correlating withdrawals or check disbursements from his checking account.

In addition, defendants have submitted a declaration from Judge Runde, who issued the search warrant, in which Judge Runde states: "I have reviewed the search warrant and the affidavit. Based upon the totality of the circumstances as set forth in the affidavit, it is my opinion that the affidavit contains sufficient facts to establish the requisite probable cause as a matter of law." (Decl. of John W. Runde, filed March 21, 1994, at ¶ 4.) While Judge Runde's opinion is just that in this context, the Court agrees with his conclusion.

seized but not authorized by the search warrant: a computer and printer, two handguns, leather gear, computer discs and programs, bank papers and bank book, and a roll of film.

The bank papers and bank books were authorized by the search warrant as "financial records identifying accounts maintained by Mr. Hazzard." (Eatmon Decl., Ex. B.) The other items, however, were not expressly authorized by the search warrant. Defendants contend that all the police officer defendants are entitled to qualified immunity because they seized these items believing them to be police department property.

The qualified immunity defense provides that "government officials performing discretionary functions . . . generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added). The test is whether the defendant's conduct was objectively legally reasonable. *Id.*

A district court in the Ninth Circuit must make three inquiries when deciding whether a defendant is entitled to the qualified immunity defense:

> (1) the identification of the specific right allegedly violated; (2) the determination of whether that right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue.

Romero v. Kitsap County, 931 F.2d 624, 627 (9th Cir. 1991). The plaintiff bears the burden of proof on the first two questions; only after plaintiff has met that burden is the defendant obligated to prove that his conduct was objectively reasonable. *Id.* A district court is obligated to make

every effort to determine the qualified immunity issue at the summary judgment stage.[3]

There is no argument about the "clearly established right" component of the qualified immunity analysis; the focus here is on "the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue." 931 F.2d at 627. In this case, the answer is in the affirmative. It is well settled that a police officer who is conducting a search pursuant to a warrant may seize incriminating evidence which is in plain view. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The police officers went to Hazzard's residence as part of a grand theft investigation stemming from his possible abuse of his position as East Palo Alto's property officer. Therefore, it was reasonable for the police officers to seize the following items as incriminating evidence: the firearms (because firearms were missing from the property section), the computer and discs (Lt. Eatmon recognized the computer as one which had been in the department's property section, and many of the discs had labels that showed their contents concerned the East Palo Alto Police Department), and the leather gear, which consisted of gun holsters, a handcuff holster, and baton rings (because this is the type of gear that the East Palo Alto Police Department issued to its police officers.)

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[3]The Supreme Court recently emphasized that "because '[t]he entitlement is an immunity from suit rather than a mere defense to liability,' . . . we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 112 S. Ct. 534, 536 (1991) (per curiam) (first alteration in original) (citation omitted). The Court explicitly rejected what had been the Ninth Circuit's rule of routinely placing the qualified immunity issue in the hands of the jury: "Immunity ordinarily should be decided by the court long before trial." *Id.* at 537.

c. Detention of Hazzard.

Hazzard argues that, although he was never placed under arrest, he was detained against his will because he was "surrounded by officers which prohibited his movement." (Pl.'s Opp. Mem. of P. & A.'s at 8.) Defendants argue that summary judgment is justified on one of two grounds: (1) Hazzard was never "seized" within the meaning of the Fourth Amendment because he was always free to leave; and (2) any detention was justified.

The Court need not reach defendants' first contention, because, even accepting Hazzard's version of the events, the temporary detention for the duration of the search (under two hours) did *not* violate the Fourth Amendment. As the Second Circuit stated in *Rivera v. United States*, 928 F.2d 592 (3d Cir. 1991), "[a]bsent special circumstances, the police of course have the authority to detain occupants of premises while an authorized search is in progress, regardless of individualized suspicion." 928 F.2d at 606 (citing *Michigan v. Summers*, 452 U.S. 692 (1981)).

d. Conclusion.

As the above discussion indicates, Hazzard has failed to show that there is a triable issue of fact as to any claim enunciated in his Second Cause of Action, so summary judgment must be granted.

3. Third Cause of Action: § 1983 Claim for "Illegal Confiscation of Property".

In his Third Cause of Action, Hazzard alleges that Lt. Eatmon and the individual officer defendants are liable under § 1983 for "removing and confiscating plaintiff's property illegally obtained," (Comp. ¶ 38.), thereby depriving Hazzard of "his constitutional right to be free from deprivations of property without due process of law and freedom from summary punishment." (*Id.*)

As noted in connection with the discussion of Hazzard's Second Cause of Action, Eatmon and the individual officer defendants acted reasonably in seizing Hazzard's property. Thus, so far as Hazzard's claim of "confiscation" rests on the seizure of the property by the police officers during the search, the Third Cause of Action must be dismissed as well.

Hazzard also maintains that the Police Department retained his property "after it was determined that plaintiff was entitled to the property." (Pl.'s Opp. at 28.) This claim is not actionable under § 1983, however. First, from a supplemental declaration filed by Hazzard, it is apparent that he has now recovered the property he contends the police unlawfully retained. (*See* Hazzard Decl., filed June 14, 1994.) Second, in *Hudson v. Palmer*, 468 U.S. 517, 533 (1984), the Supreme Court held:

> [A]n unauthorized intentional deprivation of property by a state employee does not constitute a violation of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available. For intentional, as for negligent deprivations of property by state employees, the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy.

In this case, at the time the complaint was filed Hazzard had available a suitable postdeprivation remedy: filing a motion in from of the state court judge who issued the warrant. And, as noted above, Hazzard has now recovered his property.

Accordingly, summary judgment must be granted in defendants' favor on Hazzard's Third Cause of Action.

4. Fourth Cause of Action; § 1983 Claim for "Deprivation of Civil Rights While in Employment.

In his Fourth Cause of Action, Hazzard alleges that Chief Matthews violated his constitutional rights by (1) "terminating plaintiff for exercising his First Amendment right to testify before a Grand Jury;" and (2) "disseminating to the newspapers personal and private information about plaintiff that [Chief Matthews] knew was misleading and untrue." (Compl. ¶ 42.) Hazzard also alleges that both Chief Matthews and City Manager Parker deprived him of his "right to a *Skelly* hearing or any other administrative hearing to determine whether plaintiff should have been terminated" and to enable plaintiff "to have a forum in which to clear his name." (*Id.* at ¶ 43.)

a. Hazzard's First Amendment Claim.

Hazzard testified before a San Mateo Grand Jury in November 1990, in regard to an investigation of irregularities and problems within the East Palo Alto Police Department. In November 1991, Chief Matthews became the head of the East Palo Alto Police Department. On April 23, 1992, Chief Matthews terminated Hazzard's employment as a reserve officer and as the property officer.

Hazzard alleges that he was terminated in retaliation for his grant jury testimony, in violation of his First Amendment rights. According to Chief Matthews, however, the "main reason" he terminated Hazzard "was because of his inability to manage the property section after he had been counseled on numerous occasions regarding his job." (Decl. of Burnham E. Matthews, filed March 1, 1994, ¶ 8.) Chief Matthews also stated in his declaration that "[w]hen I terminated Officer Hazzard's employment, I did not know that he had testified before the San Mateo County Grand Jury in 1990. The first time that I heard that Officer

Hazzard had testified before the grand jury was on February 24, 1994." (*Id.* at ¶ 10.)

Hazzard has produced no evidence that would tend to rebut Chief Matthews' statements and show the existence of a genuine issue of material fact on his First Amendment claim. Given the fact that Chief Matthews did not start his duties until one year *after* Hazzard's grand jury testimony, Hazzard cannot even rely on circumstantial evidence of suspiciously coincidental timing.

Defendants' motion for summary judgment on Hazzard's First Amendment claim must be granted.

b. Hazzard's Claim Arising from Chief Matthews' Press Release

Hazzard argues that Chief Matthews' action in issuing the press release violated the Due Process Clause of the Fourteenth Amendment by depriving him of "[t]he right to be free of any taint to his reputation, good name, or honor and integrity without due process of law." (Compl. ¶ 47(b).)

It is axiomatic that the Due Process Clause of the Fourteenth Amendment creates no substantive property rights, and that any rights qualifying for the Clause's procedural protections must arise from an independent source, such as state law. *Bishop v. Wood*, 426 U.S. 341, 344 (1976). Hazzard's claim is basically one for libel, but he has failed to point to any California law that creates a *property interest* in being free from libel. Therefore, he cannot rest a due process claim on Chief Matthews' issuing the press release.

c. Hazzard's Skelly Hearing Claim.

Hazzard also alleges that Chief Burnham [Matthews] and City Manager Parker deprived him of his right to a

Skelly administrative hearing in violation of the Due Process Clause of the Fourteenth Amendment. At the outset, it should be noted that Hazzard has presented no evidence that City Manager Parker had anything to do with Hazzard's suspension or termination. Moreover, Chief Matthews has stated that it was his decision to terminate Hazzard. Therefore, the Court grants summary judgment in favor of City Manager Parker on Hazzard's Fourth Cause of Action. This leaves Hazzard's claim against Chief Matthews.

The California Constitution does provide procedural due process protections for demotions, suspensions, and dismissals of public employees. *See Skelly*, 15 Cal. 3d 194. This is because the California courts have recognized that public employees have a property interest in the continuation of their employment. As the court said in *Stanton v. City of West Sacramento*, 226 Cal. App. 3d 1438, 1442, 277 Cal. Rptr. 478, 480 (Cal. Ct. App. 1991), "[d]emotion, suspension and dismissal all involve depriving the public employee of pay or benefits . . . ."

Defendants argue that Hazzard was not entitled to a *Skelly* hearing because he was an at-will employee. Hazzard's employment contract expired in June 1991. California Labor Code Section 2922 provides that "[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month." Cal. Labor Code § 2922.

Hazzard contends, however, that his contract was *orally* renewed by Chief Matthews' predecessor, Acting Chief Ronald Sibley. In his declaration, Hazzard states: "I specifically asked then-Acting Chief Ronald Sibley whether my contract would be renewed, and he told me that it would be and that I did not have to worry about it until next year." There are two problems with Hazzard's reliance on this

evidence to create an issue of material fact. First, defendants correctly point out that it is inadmissible hearsay. Inadmissible hearsay evidence may not be considered in a motion for summary judgment. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1551 (9th Cir. 1990). Second, on its face the statement attributed to Sibley does not constitute an oral renewal of a contract; at best it is an indefinite promise to renew the contract in the future.

Hazzard has not raised a triable issue of material fact as to whether he was entitled to a *Skelly* hearing. Therefore, summary judgment must be granted on this portion of his Fourth Cause of Action.

d. Conclusion.

Hazzard has failed to show that there is a triable issue of fact as to any claim enunciated in his Fourth Cause of Action, so summary judgment must be granted.

5. Fifth Cause of Action; § 1983 Claim for Municipal Liability for "Deprivation of Civil Rights While in Employment".

In his Fifth Cause of Action, Hazzard alleges that the City of East Palo Alto is liable under § 1983 for the actions of Chief Matthews and City Manager Parker, described above, because both men were final decisionmakers with policymaking authority. As the Court has already ruled that Hazzard does not state any actionable § 1983 claims for "deprivation of civil rights while in employment," summary judgment must be granted on his municipal liability claim.

6. Sixth Cause of Action; Violation of Fifth Amendment Right Against Self-Incrimination.

Hazzard alleges that "the actions of defendant Lt. Eatmon in interrogating plaintiff for more than an hour while trying to trick him into confessing to something he did

not do violated plaintiff's Fifth Amendment right to be free of coercive police tactics and his right to remain silent." (Compl. ¶ 51.)

Hazzard relies on *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (*en banc*), in which the Ninth Circuit held that police conduct that violates the *Miranda* safeguards *and* trespasses "on the actual Constitutional right against self-incrimination that those safeguards are designed to protect" may form the basis of a § 1983 claim. In *Cooper*, the police had formed a "preexisting interrogation plan," the core of which was "to ignore the suspect's Constitutional right to remain silent as well as any request he might make to speak with an attorney in connection therewith, to hold the suspect incommunicado, and to pressure and interrogate him until he confessed." 963 F.2d 1223-24. Pursuant to their plan, the police held the suspect incommunicado in custody for four hours, interrogated him nonstop until he was reduced to tears, and denied his repeated requests for counsel. The court in *Cooper* cautioned that its holding "does not create a Fifth Amendment cause of action under § 1983 for conduct that merely violates *Miranda* safeguards without also trespassing on the actual Constitutional right against self-incrimination that those safeguards are designed to protect." *Id.* at 1244.

Defendants argue that Hazzard's claim is without merit because (1) Hazzard was not in custody so *Miranda* warnings were not required; and (2) the *Cooper* case is distinguishable because the conduct of the interview of Hazzard does not "shock the conscience."

As to defendants' first point, the Court cannot determine on summary judgment whether the interview was custodial or not, as there is conflicting testimony as to whether Hazzard was free to leave. Defendants' second contention, however, carries the day. While the Court does not condone Lt. Eatmon's "ruses" (a polite word for outright false-

hoods), his conduct does not begin to approach that of the police in *Cooper*.

The court in *Cooper* stated its intent to provide a cause of action under § 1983 in cases "laden with police misconduct that is 'identical with the historical practices [of incommunicado interrogation] at which the right against self-incrimination was aimed.' " 963 F.2d at 1244 (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)). The conduct at issue in this case is not "identical with the historical practices of incommunicado interrogation." Hazzard was not arrested, restrained, or confined, as the interview took place in his own home. He was questioned for approximately one hour, as opposed to the four hours of interrogation in *Cooper*. He was not held incommunicado, as was the plaintiff in *Cooper*. Finally, he did not request counsel repeatedly, only to be ignored, as did the plaintiff in *Cooper*.

Accordingly, the Court finds that, as a matter of law, Hazzard has failed to state a § 1983 claim for violation of his Fifth Amendment right against self-incrimination, and summary judgment is merited on his Sixth Cause of Action.

7. Seventh Cause of Action: Conspiracy to Deprive Hazzard of Civil Rights

In his Seventh Cause of Action, Hazzard alleges that the actions of Lt. Eatmon, the defendant officers, and inspectors Thorpe and Sabin "in agreeing to and then detaining and searching plaintiff and his residence, in unlawfully confiscating his personal property and in interrogating him without giving him *Miranda* warnings constituted a conspiracy to deprive plaintiff of his civil rights and property." (Compl. ¶ 55.)

Because the Court has granted summary judgment on all of Hazzard's underlying claims, there are no underlying unlawful acts to give rise to a conspiracy. The Court,

therefore, grants defendant's motion for summary judgment on Hazzard's Seventh Cause of Action.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion for summary judgment is GRANTED in its entirety, and the case is dismissed.

Dated: June 28, 1994.

s/ WILLIAM H. ORRICK

William H. Orrick
United States District Judge

Original Filed June 28, 1994
Richard W. Wieking,
Clerk, U.S. District Court
Northern District of California

No. C 92-4566 WHO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ANTHONY WILLIAM HAZZARD, SR.
Plaintiff,

vs.

CITY OF EAST PALO ALTO, et al.,
Defendants.

JUDGMENT

This matter having come before the Court, and the issues having been duly presented, and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that defendants' motion for summary judgment is GRANTED and the action is dismissed.

Dated: June 28, 1994.

s/ WILLIAM H. ORRICK
William H. Orrick
United States District Judge

APPENDIX D

SEAL City of East Palo Alto

Members of the Council
Pat Johnson, *Mayor*
Warnell Coats, *Vice Mayor*
Nevida Butler
William Vines
Sharifa Wilson

April 23, 1992

Mr. Anthony Hazzard
3004 Belfast Way
Richmond, California 94806

Dear Mr. Hazzard:

You are hereby notified that your services as a Reserve Officer and Property Officer with the East Palo Alto Police Department are no longer required effective this date.

Please take immediate steps to return any Department property, identification or other materials you possess to Lieutenant John Sterling, Commander of Field Operations. He can be reached at (415) 853-3173, to make the necessary arrangements.

Sincerely,

s/ BURNHAM E. MATTHEWS
Burnham E. Matthews
Chief of Police

cc: Mr. Allen Parker, City Manager
Mr. Russell Averhart, Personnel Manager

APPENDIX E

SEAL City of East Palo Alto

Members of the Council
Sharifa Wilson, *Mayor*
William Vines, *Vice Mayor*
Nevida Butler
Rose Jacobs Gibson
R.B. Jones

EAST PALO ALTO POLICE DEPARTMENT

PRESS RELEASE

On April 16, 1992, investigators from the East Palo Alto Police Department served a search warrant at the residence of Reserve Officer Anthony Hazzard. The search warrant was issued by the Honorable Judge Runde of the San Mateo County Municipal Court.

The search warrant was the result of a lengthy and in depth inventory and audit conducted by the Department of it's property and evidence handling procedures which began approximately six weeks ago. It was during the auditing of records and storage lockers that discrepancies were discovered as well as items, specifically currency, were missing. The scope of the warrant focused on Reserve Officer Hazzard due to the fact he was the Department's Property Officer and had been acting as such for the past 2½ years. His primary responsibilities were the documenting and securing of evidence seized by officers of the Department.

Reserve Officer Hazzard was questioned and released pending the culmination of the investigation. He is currently on paid administrative leave.

While the Department regrets that this situation occurred, it is another of the on-going projects which are designed to re-establish the East Palo Alto Police Department's reputation and integrity as that of a professional police organization. This incident, while significant, should not overshadow the outstanding work being done by the other officers and civilian personnel presently working for

the Department. The act of one should [not] tarnish those hard working officers who are attempting to enhance the quality of life in East Palo Alto.

Burnham E. Matthews
Chief of Police

APPENDIX F

OFFICER PUT ON LEAVE

Money allegedly stolen from storage locker

Janet McGovern
Peninsula Times Tribune, April 19, 1992

An East Palo Alto police officer has been placed on paid administrative leave after a six-week investigation by an outside auditor turned up record-keeping discrepancies and missing money at the property and evidence room he oversaw, Police Chief Burnham E. Matthews said.

Matthews said Friday investigators had served a search warrant the day before at the home of Anthony Hazzard, a reserve officer in charge of the evidence room for 2½ years.

Hazzard was questioned and released, pending culmination of the investigation, Matthews said.

The chief said evidence possibly related to the investigation was found, but he declined to indicate whether Hazzard will be arrested or fired.

Hazzard could not be reached for comment.

Burnham, who became the East Palo Alto Police Department's chief six months ago, had ordered an audit of the property and evidence room to establish what was there at the outset of his tenure. Earlier investigations by the San Mateo County district attorney and the grand jury had pointed to problems.

Burnham emphasized that the inventory and audit are part of an effort to clean up the department. Nowhere is that more important, he said, than in the ability to handle evidence and the personal property held for prisoners until their release.

"While the department regrets that this situation occurred, it is another of the ongoing projects which are designed to re-establish the East Palo Alto Police Department's reputation and integrity as that of a professional police organization," he said in a prepared statement.

"This incident, while significant, should not overshadow the outstanding work being done by the other officers and civilian personnel presently working for the department. The act of one should not tarnish those hard-working officers who are attempting to enhance the quality of life in East Palo Alto."

The property room is where evidence and prisoners' belongings are stored in lockers and a storage-type room.

The search warrant issued by Judge John Runde of the San Mateo County Municipal Court resulted from an investigation by Dr. James Westbrook, a retired Oakland police lieutenant contracted by the chief.

"It was during the auditing of records and storage lockers that discrepancies were discovered as well as items. Specifically, currency were missing," the chief's statement said. The warrant focused on Hazzard because he is the department's property officer.

So far, money is all that is known to be missing, Matthews said. He could not say how much, at this time.

Asked whether prisoners have complained about property not being returned, Matthews said they complain more about how long it takes to get the property back. However, there have been problems in trials because of missing evidence, he said.

"This thing has been the subject of benign neglect for a long, long time," Matthews said. The audit dealt with problems with housekeeping and record-keeping, he said.

"We're still investigating and if, in fact, there's criminal culpability on anyone's part, that will be addressed and referred to the district attorney," he said.

As a result of the audit, the chief said interim measures have already been instituted and new procedural orders will be issued within the next two weeks. The audit should be complete in about two weeks.

Matthews stressed that the audit is "just another procedure that we're doing to clean up this department" so it can ultimately be a catalyst for improving the city.